

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DOMINIQUE PHILLIPS,
as Personal Representative of the
Estate of Antares Wendler-Phillips

Plaintiff,
v.

METROPOLITAN
TRANSPORTATION AUTHORITY,
THE LONG ISLAND RAIL ROAD, and
SMART, as the successor in interest to
the UNITED TRANSPORTATION
UNION-LOCAL 722,

Defendants.

Case No.: 21-cv-05679

AMENDED COMPLAINT

JURY TRIAL DEMANDED

This is a wrongful death action brought by Plaintiff, DOMINIQUE PHILLIPS, a personal representative of the Estate of Antares Wendler-Phillips, by his attorney Jonathan Rosenberg, complaining against the defendants, METROPOLITAN TRANSPORTATION AUTHORITY (“MTA”), THE LONG ISLAND RAIL ROAD (“LIRR”), and SMART, as the successor in interest to the United Transportation Union-Local 722 (“TWU”), upon information and belief, respectfully alleges as follows:

WRONGFUL DEATH

On September 27, 2019, a typical Saturday dinner for the plaintiff and his daughter, was abruptly disrupted when his wife, Antares Wendler-Phillips, unexpectedly collapsed in the kitchen. She was experiencing what appeared to be a seizure, her eyes rolling back in her head. The plaintiff quickly dialed 911, even as

1 his minor daughter stood by, paralyzed by shock. Despite the emergency services'
2 swift arrival and immediate action, the hospital delivered grim news: cardiac arrest
3 with potential brain damage; she remained on life support. By October 4, his wife
4 had passed away.
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6 This is a wrongful death complaint against the defendants arising from their
7 relentless pattern of discrimination, defamation, harassment, and retaliation
8 against Dominique Phillips during his employment with the LIRR, and which in
9 turn led to his unlawful termination from that position, thus depriving his wife and
10 daughter of a basic livelihood. The extreme stress inflicted upon the plaintiff as a
11 direct result of defendants' actions ultimately caused his wife, Antares Wendler-
12 Phillips, to suffer, based on information and belief, a fatal, stress-induced heart
13 attack in front of the plaintiff and their young daughter.
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16 PARTIES

17 Plaintiff Dominique Phillips is an individual residing at 11 Mirin Avenue,
18 Roosevelt, New York, within the Eastern District of New York.
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20 Defendant Long Island Rail Road ("LIRR") is a subsidiary of the Metropolitan
21 Transportation Authority ("MTA"), a public benefit corporation providing commuter
22 rail service in the State of New York and engaged in interstate commerce by rail,
23 operating a system of railroads and railroad yards within the jurisdiction of this
24 court and in various states.
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Defendant SMART, the successor in interest to the Transportation Workers Union-Local 722 ("TWU"), is a labor organization, formed and existing under the laws of the District of Columbia.

JURISDICTION

This Court has subject matter jurisdiction over the claim against LIRR pursuant to 28 U.S.C. § 1331, as this action arises under the laws of the United States, including but not limited to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, as there is complete diversity of citizenship between SMART and TWU, and the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

Venue is proper in this Court pursuant to 28 U.S.C. § 1391, as a substantial part of the events or omissions giving rise to the claim occurred in this District.

FACTUAL ALLEGATIONS

The Plaintiff, an African American male, was hired by the defendant, Long Island Rail Road (LIRR), on February 8, 2006, making him a member of a protected class. His role at LIRR was a Car Appearance Maintainer (CAM) at the Jamaica Station in Jamaica, New York. He was assigned to LIRR's Maintenance of Equipment Department at the Hillside Maintenance Facility, supervised by Department Head Manager Antonia Micheletti and Assistant Manager Scott Mowbray of Central Manpower.

1 Upon beginning his employment, the Plaintiff was given written policies from
2 the defendant, LIRR, on reporting racial intolerance. These policies include the
3 "MTA LIRR Equal Employment Policy Statement", "Anti-Harassment Policy", and
4 the "MTA Code of Ethics". His job as a Car Appearance Maintainer (CAM) involved
5 membership in the United Transportation Union - Local 722 (UTU), which started
6 deducting union dues and fees from his salary. The defendant's evaluation system,
7 which rates employees as either satisfactory or unsatisfactory, confirmed that the
8 Plaintiff was indeed a satisfactory employee. During his probationary period from
9 February 2006 to February 2007, he received "satisfactory" ratings on all four
10 evaluations. A "satisfactory" rating signifies that an employee consistently exceeds
11 job standards in terms of both quantity and quality across all key job functions,
12 with minimal errors and dependable job completion.

13 The Plaintiff completed assignments with minimal supervisory direction. His
14 Gang Foreman lauded him as a hardworking employee with strong work ethics in
15 his first two evaluations, while his General Foreman remarked on his timely work
16 completion in the subsequent two. As a result, the defendant, LIRR, rewarded the
17 Plaintiff with a salary increase. He successfully finished his mandatory one-year
18 probationary period on February 8, 2007, meeting all job requirements
19 satisfactorily. From February 8, 2006, to August 10, 2009, the Plaintiff worked at
20 four different LIRR Maintenance of Equipment Department worksites without
21 experiencing harassment or discrimination. However, on August 11, 2009, he
22 sustained a right shoulder injury at the Hempstead Yard, requiring surgery in
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1 November 2009 and preventing his return to regular duties until September 2010.
2 His attorney, Emil DiNardo, Esq., filed a lawsuit on his behalf against LIRR under
3 the Federal Employer's Liability Act (FELA) for negligence on December 10, 2009,
4 as LIRR employees are not eligible for workers' compensation. Upon his return to
5 work at Hempstead Yard around September 6, 2010, he was supervised by Frank
6 Angiuli.

7 After his return to work, the Plaintiff noticed that his supervisor, Angiuli,
8 exhibited discriminatory and confrontational behavior towards him and three
9 African American colleagues between September 13 and 28, 2010. Despite reporting
10 these incidents to his union, United Transportation Union, no action was taken.
11 Angiuli was removed from Hempstead after he received discrimination complaints
12 from female workers.

13 In January and February 2011, the Plaintiff attended three funerals for
14 family members. Lisa Whittingham took over as supervisor at the Hempstead Yard
15 in February 2011, during which time the Plaintiff performed his duties without
16 experiencing any workplace harassment or discrimination. However, on March 28,
17 2011, the defendant, LIRR, wrongfully accused the Plaintiff of violating its absence
18 control policy from January to February 2011, despite his attendance at funerals
19 and his taking leave under the Family Medical Leave Act (FMLA).

20 On March 29, 2011, while on family leave due to his wife's sudden death, the
21 Plaintiff filed a lawsuit against ALJ Ward and the NYS Department of Labor in the
22 U.S. District Court EDNY (CV-11-1633). The case was assigned to Judge Joanna
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1 Seybert and Magistrate Judge Arlene R. Lindsay. After a summary judgment
2 motion against his previous employer, Marriott, was denied, the Plaintiff managed
3 to settle the lawsuit, undermining the credibility of ALJ Ward's previous adverse
4 decisions about him. In late April 2011, his supervisor, Lisa Whittingham, was
5 unexpectedly relocated by the defendant, LIRR, marking the start of a so-called
6 "Domino Effect". On May 3, 2011, the Plaintiff filed his amended complaint and
7 supporting affidavit in U.S. District Court (EDNY) before Judge Lindsay. Richard
8 Wittenben, who is white, was then appointed as the new supervisor at Hempstead
9 Yard in May 2011. This change brought back and amplified the issues of a hostile
10 work environment, discrimination, harassment, defamatory treatment, retaliation,
11 and unequal terms and conditions of employment.
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13 On Memorial Day 2011, supervisor Richard Wittenben engaged in a verbal
14 altercation with the Plaintiff aboard a train during overtime work. Wittenben
15 distributed work unequally, unjustifiably disciplined the Plaintiff, and treated him
16 differently than a less senior white colleague, Keith Heyward. Despite the Plaintiff's
17 two years of seniority over Heyward, Wittenben reassigned seniority-based duties
18 from the Plaintiff to Heyward, violating established practices under the MTA
19 Agreement. These duties included cleaning train bathrooms, a task typically
20 assigned to more senior employees. Prior to Wittenben's tenure, this responsibility
21 had been assigned to the Plaintiff by the previous supervisor, Lisa Whittingham.
22 Wittenben also assigned the Plaintiff 18 to 24 cars to clean, compared to 6 to 8 cars
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1 for Heyward. The Plaintiff reported these issues to the United Transportation
2 Union, but they did not respond or intervene on his behalf.
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4 James Snyder, General Chairman of the Supervisor's Union and former gang
5 foreman to the Plaintiff, traditionally assigned work based on seniority, a common
6 practice throughout the LIRR, as acknowledged by Lisa Whittingham in her 2012
7 letter to Marilyn Kustoff. Snyder later contradicted this, stating in a letter that
8 seniority was only for bids, bumps, or vacations, and not work assignments. This
9 claim was refuted by the United Transportation Union General Chairman, Mike
10 Denn, in a letter to Daniel Cleary, emphasizing that seniority is also used for work
11 assignments to prevent favoritism and discord among employees, in line with the
12 MTA Agreement. On December 15, 2011, Richard Wittenben falsely accused the
13 Plaintiff of being "AWOL" and issued a warning despite the Plaintiff being on LIRR
14 property in his vehicle. The Plaintiff had chosen not to park near powerlines
15 adjacent to the employee lot due to health concerns, a practice that Wittenben had
16 been aware of since his arrival at Hempstead Yard and had not been problematic
17 previously.
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19 Wittenben claimed in his deposition to be unaware of the Plaintiff's parking
20 issue, which was untrue. From December 19-23, 2011, and December 26-30, 2011,
21 Wittenben allowed the Plaintiff to combine his two 15-minute breaks with his 30-
22 minute break, totaling one hour. However, on January 10, 2012, following the
23 Plaintiff's week-long vacation, Wittenben falsely accused the Plaintiff of being
24 AWOL for taking the combined hour-long break, a practice he had previously
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1 permitted. Despite reporting these incidents to the United Transportation Union,
2 no action was taken on the Plaintiff's behalf. On January 20, 2012, Road Car
3 Inspector Michael Pairan informed Wittenben that the Plaintiff had requested a
4 letter supporting his claims of workplace harassment, leading to intensified
5 bullying and ridicule of the Plaintiff. As a result of this ongoing harassment by
6 Wittenben, the Plaintiff experienced work-related stress, anxiety, and chest pains.
7 On February 16, 2012, Wittenben called the MTA Police and Nassau County EMS
8 due to the Plaintiff's chest pains.

11 After experiencing chest pains, the Plaintiff was cleared by paramedics and
12 drove himself to the Nassau University Medical Center for further observation.
13 Despite reporting this incident to the United Transportation Union, no action was
14 taken to reprimand or remove Wittenben from his supervisory position. Wittenben
15 failed to fill out the necessary forms regarding work-related illness or accidents, as
16 per the company's policy. This lack of official documentation resulted in the Plaintiff
17 not receiving compensation for work missed due to stress-related symptoms induced
18 by Wittenben's workplace harassment, which Wittenben subsequently failed to
19 report. The Union refused to file a grievance for the Plaintiff regarding Wittenben's
20 ongoing harassment. On March 16, 2012, the Plaintiff sought legal advice from his
21 previous attorney, Emil DiNardo, but was told that it would be a conflict of interest
22 since DiNardo had previously represented the Union and that the Union should
23 handle the grievances.

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1 DiNardo suggested the Plaintiff to demand his union representative, Micheal
2 Denn, to immediately file a grievance. If Denn refused, DiNardo recommended the
3 Plaintiff report the Union to the National Labor Relations Board (NLRB). It's
4 significant to note that the Union only filed a grievance on behalf of the Plaintiff
5 due to the threat of being reported to the NLRB. However, two white individuals,
6 Daniel Cleary and Marilyn Kustoff from the M of E Dept & Trial Office, issued a
7 biased decision on March 26, 2012, denying Plaintiff's disability accident (D/A)
8 status, in violation of the MTA Agreement. Despite a corroborating witness
9 statement from Plaintiff's co-worker Jessie Ward, and Wittenben's attempts to
10 cover up the incident, the Union did not appeal the LIRR's tainted decision. The
11 Plaintiff appealed the decision on his own on April 2, 2012. The Union's failure to
12 challenge the biased decision by Cleary and Kustoff may be seen as conspiratorial
13 or obstructive. LIRR subsequently leveraged this situation by targeting the Plaintiff
14 with false disciplinary charges. This campaign of harassment appears to be a
15 pretext to his complaints of racial discrimination.

16 The heads of LIRR Central Manpower Department (Micheletti), LIRR
17 Medical Department (Michael Nersesian), and Union Representative (Denn), all of
18 whom are white, received multiple copies of doctor's reports detailing Wittenben's
19 discriminatory and harassing behavior towards the Plaintiff, yet they failed to
20 intervene, subjecting the Plaintiff to a continued hostile work environment.
21 Evidence suggests that Nersesian could have adjusted the Plaintiff's disability
22 status to prevent violations of LIRR's absence control policies, as he did in February
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1 2011. From April 17 through May 2, 2012, the Plaintiff experienced further
2 harassment from Mowbray of Central Manpower, who unjustly charged him with
3 AWOL, tarnishing his reputation. Thereafter, Kustoff perpetuated the harassment
4 through rescheduling notices. As LIRR's Medical Department had the Plaintiff
5 marked as "out of work" from April 16-30, 2012, there was no valid reason for
6 disciplinary charges related to absence. Wittenben escalated the situation by
7 stalking and tailgating the Plaintiff from May through September 2012. When a
8 hearing was scheduled regarding plaintiff's complaints, Kustoff only permitted
9 management to testify.

10 On June 28 and 29, 2012, the Plaintiff's doctor, Dr. Neuhaus, documented the
11 Plaintiff's health conditions related to the discrimination and harassment. Despite
12 this, Kustoff continued to conspire by impersonating Cleary on July 3, 2012. In
13 September 2012, Wittenben disparagingly referred to the Plaintiff as a "rat" in front
14 of his co-workers for reporting the workplace harassment and discrimination.

15 Wittenben, ironically referred to as a "rat" by LIRR employees due to his
16 alleged role as a Confidential Informant (C.I.) for Kustoff in the M of E Department,
17 tried to deflect attention from himself. On September 26 and October 1, 2012, the
18 Plaintiff's physician, Dr. Neuhaus, and his former lawyer, Timothy Kilgannon, sent
19 letters to Kustoff, other LIRR officials, and the UTU. These letters addressed the
20 withholding of the Plaintiff's salary and LIRR's failure to adhere to the proper
21 protocol under the MTA Agreement. Despite numerous notifications and requests to
22 the Union to be compensated for D/A disability status by the plaintiff's late wife, her
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1 pleas were ignored. In or around August and September of 2012, on at least two
2 occasions, both Phillips and his late wife appeared in person at the Union office in
3 Babylon, New York, to speak to Denn about his salary and other issues regarding
4 his job; his wife became visibly upset and emotional because she was frustrated that
5 the Union was working against her husband, all while taking his fees and rightful
6 earnings, and causing stress in the household.

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8 Helena E. Williams, the former LIRR President, and her subordinates
9 received notice of the Plaintiff's complaints. In response, Wittenben retaliated by
10 placing the Plaintiff "out of service" on October 2, 2012, on the grounds of an
11 unfounded and defamatory "drug & alcohol" claim. When this accusation proved to
12 be baseless with a "negative" result, the Defendant fabricated an "insubordination"
13 charge to prevent the Plaintiff's return to work at the LIRR. Consequently, the
14 Plaintiff was wrongfully terminated from his job on October 26 and December 3,
15 2012. Despite multiple notifications and requests to his union to be reinstated by
16 Dr. Neuhaus and Phillips, his pleas were ignored. They took away the plaintiff's
17 livelihood – his benefits – his means of supporting his family – and all through a
18 reactive, vindictive and retaliatory culture that ignored the rules and procedures
19 meant to protect workers and their families.

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21 The Plaintiff alleges that his termination resulted from reporting his
22 supervisor, Wittenben's, abusive and discriminatory behavior. Following his
23 dismissal, his work I.D. photo was purportedly spread across the LIRR by James
24 Stevenson and the M of E Department. Various departments of the LIRR, including
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1 the former President (Helena E. Williams), Medical Department, M of E
2 Department, and the UTU, were all provided with correspondences, doctor's
3 statements, and complaints related to Wittenben's alleged discriminatory and
4 retaliatory behavior. However, no disciplinary action was taken against Wittenben.
5 The UTU, despite being aware of the LIRR's misconduct, failed to protect the
6 Plaintiff due to a direct "conflict of interest" with Denn and Anthony Crispino, who
7 served as both LIRR employees and UTU representatives.
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9 In 2012, when the Plaintiff faced unjust disciplinary charges, he was advised
10 by the UTU, his union reps, to hire a lawyer for his defense during the LIRR's
11 internal hearings, as he believed that the union was not sufficiently advocating for
12 him. The Union was incompetent as a matter of purpose. Consequently, the
13 Plaintiff hired attorney Kilgannon, who then attempted to contact Fyffe, a
14 representative from the Defendant's EEOC diversity management office. LIRR
15 counsel denied Phillips a right to a hearing by misinforming his attorney,
16 Kilgannon, that he had Union representation – that the Union would speak on his
17 behalf at the hearing. Of course, the Union failed to come to Phillips's defense. In
18 fact, Phillips's prior attorney was informed that he need not appear on the plaintiff's
19 behalf by LIRR counsel because he would have representation by the Union present;
20 Phillips ended up having no representative, and the hearing ultimately did not
21 occur as to his workplace complaints due to an adjournment to no time or date.
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23 On December 23, 2013, the Plaintiff filed his lawsuit against Defendants
24 LIRR & UTU at the U.S. Federal Courthouse in the Eastern District of New York
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1 ("EDNY"). On March 30, 2015, he submitted an amended complaint against the
2 Defendants, including several individuals.

3 During two settlement conferences before Judge Lindsay on April 6, 2017,
4 and August 15, 2017, the Plaintiff's late wife, Antares Wendler-Phillips, was
5 present to offer spousal support in the hope of a resolution. However, the Plaintiff
6 argues that Defendant LIRR attempted to mislead the court using the arbitrator's
7 decision. He claims this was especially misleading because the arbitrator was not
8 informed of the Plaintiff's transition from DIS to DI A status, a fact which he
9 testified to at his deposition. The Plaintiff accuses Kustoff and Cleary of colluding to
10 deny him his DI A status.

11 This matter, having been timely commenced, was remitted by the Second
12 Circuit Court of Appeals to the Eastern District Court for further proceedings.

13 This action is timely commenced based on information and belief, and
14 pursuant to 28 U.S.C. 2401 and 2675(a).

15 The Plaintiff's wife, Antares Wendler-Phillips, passed away on October 4,
16 2019. The Plaintiff attributes her death to the distress caused by the Defendant's
17 alleged misconduct, which includes willful harassment, discrimination, defamation
18 of character, due process violations, retaliation, unlawful suspension, wrongful
19 termination, emotional distress, embarrassment and humiliation, and financial
20 hardship. The total compensation sought for these damages and his wife's wrongful
21 death is currently undetermined. In sum, this domino effect of bad faith, insidious
22 conduct by the Union and Railroad was completely preventable, and the stress
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suffered by the Phillips family, as documented most closely by his wife's medical practitioner, took a foreseeable toll on her livelihood, and life.

AS AND FOR A FIRST CAUSE OF ACTION

Plaintiff incorporates by reference all preceding paragraphs as though fully set forth herein.

The plaintiff's wife suffered a wrongful death under EPTL § 5-4.1, which is appropriately brought pursuant to federal law.

10 The defendants, LIRR and TWU, owed a duty of care to Phillips to provide a
11 workplace free from discrimination, harassment, and retaliation.

12 The defendants breached their duty of care by engaging in a pattern of
13 discrimination, defamation, harassment, and retaliation against Phillips.

15 The defendants' breach of their duty of care proximately caused Antares
16 Wendler-Phillips to suffer a fatal, stress-induced heart attack, resulting in her
17 wrongful death.

18 As a direct and proximate result of the defendants' conduct, Phillips and his
19 daughter have suffered and continue to suffer from severe emotional distress, pain,
20 and suffering, as well as the loss of support, companionship, and guidance of
21 Antares Wendler-Phillips.
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The plaintiff seeks damages for emotional distress, compensatory damages, and punitive damages.

26 The plaintiff alleges, based on information and belief, that at least 30 days
27 has elapsed since the demand upon which plaintiff's action was founded was

presented to a member of the authority or other officer so designated for purposes of any neglect.

The plaintiff seeks attorney's fees, costs, and pre-judgment interest due to this action, along with any other relief deemed appropriate by the Court.

6 The plaintiff reserves the right to amend this complaint.

PRAYER FOR RELIEF

WHEREFORE, the plaintiff requests that the Court grant all allowable damages, including compensatory, emotional, and punitive, as well as reasonable costs and attorneys' fees under 42 U.S.C. §§ 1988 and 12205, or other applicable law, pre- and post-judgment interest to the fullest extent permitted by law; and any additional relief the Court deems just and proper.

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Dated: Brooklyn, New York
June 26, 2023